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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 631

WALTER E. ALLEN,

Appellant,

vs.

M. LUCILLE ALLEN

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT OPPOSING JURISDICTION

TOM W. GARRETT,
Counsel for Appellee.

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OBJECTIONS TO JURISDICTION AND JURISDICTIONAL STATEMENT AND ARGUMENT AND AUTHORITIES IN OPPOSITION THEREOF

These objections are filed under Rule 12(2, 3) because petitioner has served us with Rule 12(2), although we deem such rule clearly inapplicable to a petition for writ of certiorari.

The respondent respectfully submits that the Supreme Court of the United States does not have jurisdiction to entertain an appeal or review of the judgment of the Supreme Court of the State of Oklahoma.

1. The claim or denial of full faith and credit of a judgment of a sister state is without merit where the effect of such judgment under the laws of the sister state are not

plead or introduced in evidence and the laws of the state of the forum are controlling, it being presumed that the laws are the same.

2. A state court does not have power to enter a nunc pro tunc order varying the rights of the parties as fixed by the original decree, such *nunc pro tunc* order of a sister state being without notice to the other party is void.

A review of the record of this case as shown by the transcript and the exhibits attached to the jurisdictional statement show that Mrs. Allen, the respondent, the wife of Mr. Allen, was a resident of the State of Illinois; that on August 4, 1939, they entered into an agreement in full settlement of all property rights of the parties; that Mr. Allen filed suit for divorce in Nevada on August 10, 1939, a local attorney appearing for Mrs. Allen, and that such divorce was granted on August 10, 1939. The trial court of Nevada in entering the decree for divorce for the husband approved the property agreement under a form of journal entry which is commonly used in that state granting a divorce and stated: "It is further ordered that the agreement between the parties hereto, dated August 4, 1939, be, and it is hereby approved, adopted and confirmed by this court, and the parties hereto directed to comply therewith and to execute the terms thereof." It did not contain any portion of the terms of the agreement, or show that the husband was required to pay the wife monthly installments of $140.00 during her lifetime. (*Allen* v. *Allen,* 196 Okla. 36, Exhibit 3, Petitioner's Statement.)

Mr. Allen moved to Oklahoma shortly after obtaining a divorce in Nevada and being in default in the monthly payments, Mrs. Allen filed the first suit on this agreement in February, 1943. After service of summons was had, Mr. Allen set up the Nevada decree in his answer, offered it in

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evidence, and the trial court held that the agreement was merged in such decree. Upon appeal to the Oklahoma Supreme Court by Mrs. Allen, such court reversed the trial court (*Allen* v. *Allen, supra*), holding that as no one could determine the rights of the parties under the decree without referring to the contract, such agreement was not merged in the decree, and that Mrs. Allen was entitled to a judgment for the installments accruing under said agreement. Mr. Allen did not file a petition in this court for a review of such decision of the Oklahoma Supreme Court, but paid the installments accruing up to and including December 31, 1945.

Mr. Allen thereafter refusing to pay subsequent installments under the agreement, Mrs. Allen filed a second suit in the Oklahoma District Court on April 12, 1946. Personal service was had on Mr. Allen on April 17, 1946. (Tr. 7-15.) Mr. Allen, in his answer (Tr. 18-39), which was filed on May 13, 1946, attached thereto an order, styled *Nunc Pro Tunc* entered by the Nevada trial judge on April 29, 1946, which changed the divorce decree by stating (Tr. 35): "It is further ordered that the agreement between the parties hereto dated August 4, 1939, be, and it is hereby approved, adopted, ratified and confirmed by this court *and made a part of this decree and incorporated verbatim within the four corners thereof as follows:*" The contract was then copied in the decree, which further provided (Tr. 28): "*and said contract is legally extinguished and merged into this decree and the parties are hereby directed to comply with the terms of this decree in lieu of said contract.*" (The italicized portion, as well as the agreement, were additional statements which did not appear in the original decree.) The petitioner admits (Tr. 48) that no notice was given the wife by the husband in obtaining this *ex parte* modification of the original Nevada divorce decree.

We have two distinctly different judgments here. The first judgment did not provide for the payment of any money, or provide for anything except a divorce, so the contract was not merged therein and Mrs. Allen was entitled to receive the monthly installments during her natural lifetime and a suit could be maintained in Oklahoma or wherever Mr. Allen could be found on such agreement. The second judgment provides for the payment of money, merges the contract therein and reduces Mrs. Allen's right to receive the monthly payments for her natural lifetime to a judgment which may be modified from time to time (Mr. Allen's brief, Tr. 93).

Is not the omission of the incorporation of the contract in the first decree a matter of judicial discretion of the trial court? We believe it is judicial discretion which is sustained in the two Allen opinions and in *Elliott* v. *Dunham*, 191 Okla. 395, and cases cited therein, which authorizes the trial court to approve the contract as it was approved by the Nevada trial court in 1939, or disapprove it and enter a judgment that the court may have determined to be fair and equitable, or approve a portion of such agreement and enter a judgment as to other matters as the court believed to be proper, or to enter judgment as was entered by the Nevada court in its *ex parte nunc pro tunc* order in April, 1946, incorporating the agreement, and if Mrs. Allen did not agree with such judgment as entered, she would have had the right to appeal to the Supreme Court of Nevada and had a final determination of such right.

Under Rule 45 of the Nevada Court, as set forth in *Finley* v. *Finley*, 189 P. 2d 334:

> "No judgment • • • shall be vacated, amended, modified, or corrected by the court or judge rendering, making, or ordering the same, unless the parties desiring such vacation, amendment, modification, or correc-

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> tion shall give notice to the adverse party of such motion thereof within six months after such judgment was rendered or made • • •"

Mr. Allen submitted the issues involved when he introduced the Nevada judgment as originally entered without offering or introducing any Nevada laws contrary to the laws of Oklahoma. That upon the reversal of the first trial of this case by the Supreme Court of Oklahoma he became bound by such decision and the laws of the State of Oklahoma. Mr. Allen is not entitled to the full faith and credit clause of the Constitution when he failed to prove that the laws of Nevada are different from the laws of Oklahoma. *Western Life Indemnity Company* v. *Rupp*, 235 U. S. 261, and cases cited in Mrs. Allen's brief (Tr. 105-107).

We are unable to find where any court has approved the procedure that Mr. Allen has attempted to have approved in this case, as under such procedure no judgment would become final, as it would allow a party to rely upon a judgment of a sister state as offered in evidence by him only so long as the court of the forum agreed with his interpretation of said judgment.

The petitioner admits that Mrs. Allen had no notice of these proceedings (Tr. 48). Mr. Allen, a resident of the State of Oklahoma, caused this void procedure to be instituted after he had been sued and served with summons (Tr. 15) in order that he might bring himself within the statute of limitations of Oklahoma, Title 12, Section 95:

> "Civil Actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> • • • • •
>
> "Fourth. Within one year: An action on a foreign judgment; • • •"

The law of the forum prevails as to statute of limitations. *State of Ohio ex rel* v. *Porter*, Cal., 1942, 129 P. 2d 691, certiorari denied by this court 318 U. S. 757.

He also attempts by the Nevada *ex parte nunc pro tunc* order to bring himself under the decisions of the Oklahoma court—*Finley* v. *Finley*, 174 Okla. 457, and *McRoberts* v. *McRoberts*, 177 Okla. 156, decided in 1935, which hold that an agreement to pay the wife monthly installments for life, set forth in the decree, the agreement became merged therein, and suit could not be maintained in Oklahoma on said decrees, as a decree for alimony payable in monthly installments is void. These cases were discussed in the briefs filed by the parties in the state supreme court, and also by the two Supreme Court decisions of this case.

The modified decree was introduced at the trial by Mr. Allen over the objections of Mrs. Allen (Tr. 49). No laws of Nevada were pleaded or introduced to support the husband's right to obtain a modification of a divorce decree almost seven years after the original order was entered and during the time an action was pending between him and Mrs. Allen in the State of Oklahoma (the forum selected by Mr. Allen to have these questions tried out). It was stipulated (Tr. 48) that no notice was given and that the laws of Nevada were the same as Oklahoma as to the authority of the trial court to approve or disapprove such contracts in divorce cases. Cases sustaining the procedure of the trial court in 1939 were cited in Mrs. Allen's brief (Tr. 104-107) and are sufficient to sustain the trial court's decision (Tr. 53) and the decision of the Supreme Court of the State of Oklahoma (Tr. 124-134).

The wife's brief as presented to the Supreme Court of Oklahoma (Tr. 98-114) has ample authority to show that this court does not have jurisdiction. We are preparing for printing and filing a brief opposing the petition for

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writ of certiorari, and although we are satisfied that Rule 12 is inapplicable and that there is no authority for filing the jurisdictional statement and no necessity for us to file an opposition thereto under Rule 12, we respectfully submit to the Court's attention a few of the leading authorities in opposition of the Court's jurisdiction.

The claim of denial of full faith and credit of a sister state's judgment is without merit where the effect of such judgment under the laws of the sister state was not brought to the attention of the court below. *Gasquet* v. *Lapyre*, 242 U. S. 367; *Western Life Indemnity Company* v. *Rupp*, 235 U. S. 261.

The laws of Oklahoma, the state of the forum, are controlling unless the petitioner pleads and proves the laws of Nevada to be different. *Mason* v. *Pelkes*, Idaho, 1936, 59 P. 2d 1087, certiorari denied by this court 229 U. S. 615; *Hanley* v. *Donoghue*, 116 U. S. 1.

A judgment varying the rights of parties as fixed by any judgment is void. The court does not have power to enter a *nunc pro tunc* order incorporating an agreement unless notice is given within six months after a judgment is returned. *Finley* v. *Finley*, Nev. 1948, 189 P. 2d 334.

Modification of a judgment being without legal notice is void. *Allen* v. *Allen, supra;* and Mrs. Allen's brief (Tr. 107-109).

A judgment recovered in a sister state where service was had fraudulently is void and such defense may be set up in the state of the forum. *Wyman* v. *Newhouse*, 2nd Cir. 93 F. 2d 313, certiorari denied by this court 303 U. S. 664.

Want of jurisdiction over either the person or subject matter is open to inquiry. *Milliken* v. *Meyer*, 311 U. S. 457.

Full faith and credit does not require the recognition of the judgment of another state where the judgment was rendered

by a court without jurisdiction, or where it was obtained by extrinsic fraud, as the full faith and credit clause does not require a state to give a judgment of a sister state any more effect than it would have in the state where rendered. *Perkins* v. *Benquet Consolidated Mining Company*, Cal. 1942, 132 P. 2d 70, certiorari denied by this court 319 U. S. 774.

We respectfully submit that the record in this case conclusively shows that the petitioner is not entitled to a review of the judgment of the Oklahoma Supreme Court by this Court; that the full faith and credit clause of the Constitution is not involved; that the modification of the Nevada Court was void and was without due process and was caused to be entered on the part of the petitioner in order that he might evade an agreement entered into with his wife in Illinois who was never a citizen or resident of the State of Oklahoma and who was compelled to submit her rights under the laws of this state by Mr. Allen selecting Oklahoma as a forum.

TOM W. GARRETT,
Counsel for Appellee.